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IN THE
COURT OF APPEALS OF INDIANA

ERIC GOETZ, ERIC GOETZ MASTER BUILDER, INC.,	)	
Appellants-Defendants,	)	
vs.	)	No. 45A03-0710-CV-493
CHRISTOPHER BOYER and BETH BOYER,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Judge
Cause No. 45D11-0603-PL-34

July 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Eric Goetz and Eric Goetz Master Builder, Inc., (collectively "Goetz") appeal the trial court's award of $638,550.13 to Christopher and Beth Boyer. We affirm in part, reverse in part, and remand.

Issues

Goetz raises numerous issues on appeal, and the Boyers filed a motion to dismiss and assert failures in Goetz's brief. We consolidate and restate these issues as:

I. whether Goetz's appeal is prohibited because he received money pursuant to the trial court's judgment;

II. whether Goetz's brief complies with Indiana Appellate Rules 22 and 46;

III. whether the trial court erred in interpreting the construction contract; and

IV. whether the trial court's judgment is clearly erroneous.

Facts

The Boyers hired Goetz to build a home and barn in Lowell, after taking bids from several builders. To lower the cost of the project, the Boyers downsized the home and removed certain features after receiving the initial bid. Goetz proposed a second bid on the new plans. On November 1, 2004, the parties entered into a construction contract based on the second bid for $508,546.00 "subject to change due to market fluctuations in materials and/or changes the owners make during the construction process." Appellant's App. p. 44. The home was to be completed by August 1, 2005. As part of the construction agreement, the Boyers transferred title of the property to Goetz in order for

him to secure a construction loan. Construction of their home was not complete until January 13, 2006, after which Goetz presented an invoice for $775,063.41 on May 29, 2006. Goetz filed additional invoices for $716,572.54, $719,862.93, and $743,800.78.

On February 7, 2007, the Boyers filed a complaint against Goetz alleging that the final fixed price of the contract was $468,030.00 (including deductions for contractors already paid) and requesting specific performance—that the trial court enter an order for Goetz to return title and possession of the real estate for that price. Goetz counterclaimed,[1] alleging that the construction contract was a cost-plus contract and he was entitled to all his costs, time expended, plus seven percent profit and overhead. While the litigation was pending, Goetz listed the real estate for sale and the Boyers moved for a temporary restraining order and preliminary injunction. The trial court granted the preliminary injunction and Goetz retained title while the matter proceeded through an eight-day bench trial.

On August 20, 2007, the trial court ordered a judgment of $638,550.13 payable from the Boyers to Goetz as consideration for the construction of the home. The trial court concluded that the original contract price was $508,546.00 and that $114,759.84 was due for extra work added by the Boyers, $8,033.19 as seven percent profit and overhead added on to the extras, $6,796.60 as the loan fees due to the construction loan

[1] Neither party provided the complaint, answer, or counterclaim in the record on appeal.

lender, and $414.50 for utility charges.[2] Goetz was to deliver the title and pay any outstanding balance on the construction loan. Goetz filed a notice of appeal on September 19, 2007. He accepted $648,347.06 from the Boyers and delivered the title to them on October 29, 2007. The Boyers filed a motion to dismiss the appeal on December 12, 2007.[3]

Analysis

I. Motion to Dismiss Appeal

The Boyers moved to dismiss the appeal under Indiana Code Section 34-56-1-2, which states: "The party obtaining a judgment shall not take an appeal after receiving any money paid or collected on a judgment." Goetz accepted $648,347.06 from the Boyers. From that figure, $644,575.24 was distributed to fulfill the construction loan, a remainder went to fees and various charges, and Goetz personally collected $2,568.79. See Ex. 6. The Boyers contend that because Goetz has collected the judgment and handed over the title that he has forfeited his right to appeal. Goetz counters that he was "absolutely entitled" to the amount he collected and such entitlement is an exception to the statute. Appellant's Br. in Opposition to Motion to Dismiss p. 4.

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[2] The trial court also assessed an extra $11,097.00 due for the changes to the barn. It is unclear where this figure is added to the total, or if it was paid separately, but the parties do not dispute this charge or the calculation.

[3] On February 11, 2008, the motions panel of this court directed that the motion to dismiss was to be ruled upon by the writing panel and would be held in abeyance until that time. The case was then fully briefed by both parties.

The statute merely summarizes the common-law rule "that a party cannot accept the benefits of a decision and yet claim it is inconsistent." Ind. & Mich. Elec. Co. v. Louck, 243 Ind. 17, 21, 181 N.E.2d 855, 856 (1962). Our supreme court reasoned that "where no inconsistency in the position taken exists, the general rule is not applicable. An acceptance of an amount to which the acceptee is entitled in any event, does not estop him from appealing or claiming error in the judgment, since there is no inconsistency in such position." Id., 181 N.E.2d at 857.

Our court has previously concluded that when an appellant accepts a sum pursuant to judgment, but appeals to collect more, the appeal may proceed and a motion to dismiss the appeal must be denied. See R&R Real Estate Co., LLC v. C&N Armstrong Farms, Ltd., 854 N.E.2d 365, 370 (Ind. Ct. App. 2006) ("[appellant] contends that it is entitled to more, and a reversal of the judgment based on [appellant's] appeal would not result in [appellant] receiving any less"). This reasoning is supported by the following language from the C.J.S., which has been cited by Indiana courts on multiple occasions:

> The rule that a party cannot maintain an appeal or writ of error to reverse a judgment or decree after he has accepted payment of the same in whole or in part has no application, as a rule, where appellant is shown to be so absolutely entitled to the sum collected or accepted that reversal of the judgment or decree will not affect his right to it, as in the case of the collection of an admitted or uncontroverted part of his demand, and in other similar cases, as where his appeal is to establish his claim to something additional or to a greater amount.

Ind. & Mich. Elec. Co., 243 Ind. at 22, 181 N.E.2d at 857 (citing 4 C.J.S. Appeal and Error § 216(1), p. 650) (emphasis added); see also State v. Kraszyk, 240 Ind. 524, 530,

167 N.E.2d 339, 342 (1960); State ex rel. Jackson v. Middleton, 215 Ind. 219, 224, 19 N.E.2d 470, 472 (1939). Although Goetz collected over $600,000.00, the contract entitled him to at least $508,546.00 and he appeals only to collect more. We conclude his appeal should not be dismissed.

II. Compliance with Appellate Rules

The Boyers argue that Goetz's brief completely lacks adequate citation to the record, and therefore, his claims of error should be waived. The Boyers contend Goetz puts them and this court in a position that impedes consideration of the issues. Reviewing this multi-volume transcript of an eight-day trial was not a simple task, and Goetz's brief is thirty-six pages long and many pages do not contain one cite.

Goetz attempted to remedy any problems by including a list of topics and reference cites to the transcript in his reply brief. This attempt is not complete and we still find that many statements throughout the argument section of the brief do not contain legal citation or citation to the record. When we deem a specific argument to lack cogency or find that assertions and alleged facts lack any citation or reference to the record, we will find such arguments waived. See Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citation to authorities, statutes, and the Appendix or parts of the Record on Appeal."); Carter v. Indianapolis Power & Light Co., 837 N.E.2d 509, 514 (Ind. Ct. App. 2005) (waiving issue where party failed cite to the record or authority to support its argument), trans. denied. Although we proceed to address the majority of the issues on the merits here, we remind counsel to

provide briefs with adequate citations as contemplated by Indiana Appellate Rules 22 and 46.

III. Interpretation of the Construction Contract

Goetz argues on appeal that the trial court erred in interpreting the construction contract as a fixed-cost contract. "Our standard of review for the interpretation of unambiguous contracts is de novo without deference to the trial court." Liberty Ins. Corp. v. Ferguson Steel Co., Inc., 812 N.E.2d 228, 230 (Ind. Ct. App. 2004). Unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning. Four Winds, LLC v. Smith & DeBonis, LLC, 854 N.E.2d 70, 74 (Ind. Ct. App. 2006), trans. denied. "A contract is ambiguous only where a reasonable person could find its terms susceptible to more than interpretation." Cummins v. McIntosh, 845 N.E.2d 1097, 1104 (Ind. Ct. App. 2006), trans. denied. If the contract is unambiguous, the intent of the parties is determined from the four corners of the document. Id.

Regarding construction costs, a paragraph of the contract provides:

> The owners shall pay to the Contractor the total price of $508,546.00 for providing all of the materials and labor within the scope of this agreement. This price is an estimated cost (an approximate or tentative price) which is subject to change due to market fluctuations in materials and/or changes the owners make during the construction process. The final contract price will be calculated upon completion and equal the said total of all actual material, subcontractor, and labor costs with a 7% markup of said final price.

Appellee's App. p. 44. The trial court concluded that this paragraph meant the agreed price would be modified, up or down, only for changes in the price of materials or for changes ordered by the Boyers. Goetz argues that the use of the words "estimated,"

"approximate," and "tentative" are inconsistent with the trial court's conclusion that the contract contained a fixed price. Our analysis of the contract leads us to conclude is it neither a pure fixed-price nor a pure cost-plus contract. Moreover, although Indiana cases include and reference terms like "fixed-price" and "cost-plus" we are unable to cite an Indiana case that provides explicit definitions and examples of such contracts.[4] Even if we were to label this contract as a cost-plus, Goetz is not automatically entitled to every additional dollar he requests.

> An agreement to do work on a cost-plus basis does not mean that one has the right to expend any amount of money he or she may see fit upon the work, regardless of the propriety, necessity, or honesty of the expenditure, and then compel repayment by the other party, who has relied on his or her integrity, ability, and industry. In any cost-plus contract there is an implicit understanding between the parties that the cost must be reasonable and proper. The contractor is under a duty of itemizing each and every expenditure made by him or her, and where the other party denies being indebted to the contractor the latter has the burden of proving each and every item of expense in connection with the performance of the contract. Presentation of invoices and statements of account, accompanied by proof of payment, is the proper method of proving the expenses or costs; the presentation of an invoice in globo for numerous items will not meet that requirement.

17A Am. Jur. 2d Contracts § 495.

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[4] "A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor . . . . Variations on the pure fixed-price contract may contain some formula or technique for adjusting the contract price to account for unforeseen cost elements." Bowsher v. Merck & Co., Inc., 460 U.S. 824, 826, 103 S.Ct. 1587, 1590 n.1 (1983) (citations omitted) (explaining fixed-price in the context of government contracts). American Jurisprudence Second provides two definitions of a cost-plus contract: **"**A 'cost-plus contract' is one under which one party undertakes to pay all the costs incurred by the other party in the performance of his or her contractual duties, plus a fixed fee over and above such reimbursable services." 13 Am. Jur. 2d Building Contracts § 19. "A cost-plus contract is one in which the contract price is the contractor's estimated cost plus a percentage of cost for the contractor's overhead and profit." 17A Am. Jur. 2d Contracts § 495.

The plain language of the construction costs paragraph means to us that Goetz will build the home for $508,546 but he will then add any costs for extra things added by the Boyers and market fluctuations in the cost of materials, plus seven percent of the new total including those add-ons and fluctuations. This interpretation harmonizes with the remainder of the contract, which specifically lists additional costs separately. It is entitled "Changes and Alterations" and provides:

> All changes increase costs due to the extra time and material involved. Please keep in mind your allowances while discussing your needs with subcontractors. Also, allowances for flooring, cabinets, doors, and lighting fixtures, ect. [sic], are just that-allowances. The said owners are responsible for going over or under the allotted amount. Such changes or alterations shall be added to and become part of this agreement, which orders executed by one Owner shall be binding on all Owners.

Appellee's App. p. 44.

Though the $508,546.00 figure is referred to as an "estimated cost," the contract states it is only to change "due to market fluctuations in materials and/or changes the owners make during the construction process." Id. Essentially, Goetz contends that the figure of $508,546.00 is only tentative and the final recalculation is to be the actual price of construction and a seven percent markup. Goetz's requested interpretation of the contract would lead to an illogical result. This interpretation makes an estimated cost unnecessary and leaves Goetz in a position to bid as low as possible, but then to accrue an unlimited amount of actual construction costs. In addition, as set out in the American

Jurisprudence Second excerpt above, the contractor still has the burden to prove each and every additional claimed expense.

Our interpretation of the contract varies slightly from the trial court's and requires an amendment to the calculation of the judgment and reversal in part. The trial court calculated the judgment as an original contract price of $508,546.00, plus $114,759.84 of extras "due for basement, subs, and materials," plus $8,033.19 for the "7% profit and overhead (on extras)," for a total of $631,339.03. Appellee's App. p. 27. The trial court only added the seven percent markup to the cost of the extras, whereas we conclude that the seven percent markup should apply to the final contract price after the extras, which is $623,305.84. Seven percent of this total is $43,631.41. This new calculation for the markup results in an additional amount $35,598.22 to be added to the judgment. To the extent that the final judgment was $638,550.13 we reverse in part and remand for an order to add $35,598.22 owed to Goetz.

IV. Calculation of Judgment

The core of the litigation was deciding which extra costs claimed by Goetz were truly a cost that should be added to the contract price. Although Goetz insisted all the extra costs were added to the contract, the Boyers contended that the majority of his claimed additional expenses were not changes they ordered and were not supported by evidence. The Boyers conceded to the costs incurred to finish the basement, an add-on not in the original plans.

The trial court considered the parties' arguments and evidence of construction costs during an eight-day bench trial. It issued extensive findings of fact and conclusions

of law, totaling twenty-seven pages. Indiana Trial Rule 52(A) instructs us to apply the clearly erroneous standard of review of facts determined in a bench trial, with due regard given to the opportunity of the trial court to assess witness credibility. We first consider whether the evidence supports the findings, construing the findings liberally in support of the judgment. H&G Ortho, Inc. v. Neodontics Int'l, Inc., 823 N.E.2d 718, 728 (Ind. Ct. App. 2005). A finding is clearly erroneous if a review of the record leaves us firmly convinced that a mistake has been made. Id. When the findings of fact and conclusions thereon do not support a judgment, then it is clearly erroneous. Id. at 729. In applying this standard, we consider the evidence that supports the judgment and reasonable inference drawn from it, but we do not reweigh the evidence or judge the credibility of witnesses. Id. "Challengers must establish that the trial court's findings are clearly erroneous." Grathwohl v. Garrity, 871 N.E.2d 297, 300 (Ind. Ct. App. 2007) (internal citations omitted).

The trial court expressed that its findings were limited to determining what was "change made by the owners during the construction process" and what market fluctuations occurred. Appellee's App. p. 13. The trial court methodically examined all of the claims and organized its findings into sections for subcontractors, materials, and labor charges, with a specific breakdown of items amounting to thirty-one seperate categories.

A. Surveys and Permits

Goetz contends that the Boyers were not entitled a credit of $75.00 for surveys and permits and that he was entitled to an additional $650.00 for soil tests. Goetz asserts that

the soil test costs are in the contract "as Customer will provide" but we do not find such guidance in the contract. Appellant's Br. p. 16. Goetz is not due the additional $650.00 and the trial court's finding regarding the credit is supported by the evidence.

B. Sitework

Goetz argues he is entitled to his entire overage of $17,030.72 for sitework, when the trial court only allotted $14,663.30 of that amount. He contends that the trial court ignored costs for work that was not in the drawings or was ordered by Chris Boyer. The trial court found that the additional claimed charges were not changes made by the Boyers. Goetz points us to sixteen pages of trial transcript to support the proposition that "the work was contracted direct with Boyer." Appellant's Reply Br. p. 12. That portion of the transcript includes testimony of a subcontractor explaining that he did work for Chris Boyer outside of the relationship with Goetz including grading for the circle drive, burying downspouts, and putting in a dry well. This testimony fails to persuade us that Goetz is entitled to the additional money. Goetz argues that the trial court should also have awarded him the extra costs, which he does not specify or enumerate, of raising the garage floor. The trial court determined that the level of the garage floor was not a preference or change of the Boyers, but rather a correction for Goetz's construction error. The trial court's findings on these issues are supported by the evidence.

C. Concrete

Goetz alleged $18,513.50 in overages for the concrete work, but the trial court found only $11,321.00 attributable to changes made by the Boyers. Goetz contends that increased winter service costs of concrete was a market fluctuation and the remainder of

the overage is due to requests by the Boyers. The trial court found the rest of Goetz's claims beyond the $11,321.00 to be unsubstantiated or part of the contracted price. Goetz does not point us to any specific evidence to show the trial court's findings or conclusions are unsupported and erroneous.

D. Cornice and Siding Materials

Goetz argues that the photographs of the home show trim and siding that is different from the plans and that was added at the request of the Boyers. Goetz cites to the exhibits with the drawings and photographs, but points to nothing to support this was a change requested by the Boyers. The trial court found that the finished work on the home matches the depiction in the plans and was not a change. It concluded that the overage was due to Goetz's own errors in estimation. Goetz has not established that the trial court's findings or conclusions on this issue are clearly erroneous.

E. Frame and Lumber

The trial court determined that finishing the basement was a change directed by the Boyers and awarded $30,000.00 as the agreed price, after considering contradicting evidence. We will not reweigh that evidence here. Goetz contends that he is entitled to an additional $27,432.17 for the trimming and staircase and materials increase alone and the trial court erred by lumping this amount into the total for the basement. Goetz points us to the lumber bills and his own testimony, but the bills do not establish what elements were changes or fluctuation in price and the trial court was in the best position to assess credibility of witnesses. Goetz's arguments are unavailing and the trial court's findings on these issues are not clearly erroneous.

F. Labor

Goetz contends he is entitled to an additional $36,767.50 for frame and trim labor. The trial court awarded nothing for these overages. The evidence showed time cards were destroyed and there were no accurate time records for any time spent on changes. The trial court also pointed out that the final bids for labor work were still calculated on the original drawings of the bigger home and reasoned claims of exceeding such estimates were not credible. Goetz has not convinced us that the trial court's findings are clearly erroneous. Goetz also contests the trial court's findings regarding insulation**,** drywall, and cabinet and counter allowances, but does not support these arguments with citations to authority or to the record. We deem these arguments waived.

G. Interest, Real Estate Taxes, and Utilities

Goetz finally argues that the trial court rewrote the contract for the terms involving the Boyers' payment of interest fees and closing costs of the construction loan. He also contends that real estate taxes and utility fees should be paid by the Boyers and the trial court erred in its assignment of such costs. The trial court actually found that the Boyers did have a contractual obligation for a portion of the fees owed to DeMotte State Bank for the construction loan. The total bank fees due were $23,937.85, but the trial court found that Goetz was responsible for the fees that accrued after the contractual date for completion of building. The trial court handled the assignment of the utility fee in a similar way, assessing to the Boyers only the fees accrued up to November 2005, which was the time when Goetz barred them from entering the property. The trial court found that Goetz was the party that first breached the contract and as such, he could not benefit

from his breach. See Licocci v. Cardinal Assocs., Inc., 492 N.E.2d 48, 52 (Ind. Ct. App. 1986) ("A party first guilty of a material breach of contract may not maintain an action against the other party or seek to enforce the contract against the other party should that party subsequently breach the contract."), trans. denied. He breached the contract by failing to complete the construction by the agreed upon date without justification of unforeseen delays. Therefore, extra costs incurred on the property when the Boyers should have been in possession, but were not, were properly attributable to Goetz.

Conclusion

Goetz's appeal survives the Boyers' motion to dismiss, but some arguments are waived for failure to comply with appellate rules. We reverse in part in line with our interpretation of the construction contract. We remand for the trial court to enter an order for an additional $35,598.22 payable to Goetz. The findings and conclusions are otherwise adequately supported and the remainder of the judgment is not clearly erroneous. The judgment of the trial court is affirmed in part, reversed in part, and remanded.

Affirmed in part, reversed in part, and remanded.

CRONE, J., and BRADFORD, J., concur.